September 16, 2022

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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ORDER ON PREEMPTION

SUBJECT: **COUGAR CREST ESTATE WINERY (BUSL200009), AND CAVE B. LLC DBA CAVE B ESTATES WINERY (BUSL200029)**
Business License Appeal

Location: 14366 & 14356 Woodinville-Redmond Road NE, Woodinville

Appellants: Cougar Hills LLC (dba Cougar Crest Estate Winery) &
Cave B LLC (dba Cave B Estate Winery)
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Overview

1. Cougar Hills and Cave B (Appellants) contest King County Department of Local Services (Local Services) denials of their adult beverage business license applications. Their appeals include a threshold challenge to the portion of a County ordinance that requires them to obtain a County license; Appellants assert that this licensing requirement is preempted by state law. We allowed the parties to brief the issue and now issue our order.

2. Although examiners have implied authority to decide a variety of issues, even those involving preemption, we explain below why we do not have jurisdiction to rule on Appellants' particular preemption claim here. We then perform a preliminary analysis of the merits of the preemption claim, to the extent necessary to decide whether, if Appellants desire interlocutory review now, that is warranted; we conclude that it is. And we close with thoughts on next steps (which we will discuss at next week's conference), before formally denying Appellants' motion.

Examiner Authority to Rule on Appellants' Preemption Claim

Preemption is a Constitutional Claim

3. Intervenors assert that we do not have authority to consider or rule on Appellants' preemption claim, because preemption is a constitutional claim, and examiners have no jurisdiction over constitutional claims.

4. Appellants respond that they have not asked us to make any determination regarding ordinance 19030's (the Ordinance's) constitutionality. That is incorrect. Appellants have asserted that the Ordinance's adult beverage business license requirement is pre-empted by RCW 66.08.120 (the Statute). A claim that a local ordinance is preempted by state law is, by definition, a constitutional claim, as cases Appellants cite show. *Brown v. City of Yakima*, 116 Wn.2d 556, 807 P.2d 353 (1991) (ordinance may violate Const. art. 11, § 11 if state preempts field or local ordinance directly and irreconcilably conflicts with state statute); *Emerald Enterprises, LLC v. Clark County*, 2 Wn. App. 2d 794, 413 P.3d 92 (2018) (Const. art. 11, § 11 only allows localities to make and enforce regulations that do not conflict with state law).

5. Appellants are raising a constitutional claim. That does not, however, automatically answer whether we have implicit authority to hear that claim. Instead, that answer requires a more nuanced analysis.

Examiner Authority—Background

6. Intervenors cite *Exendine v. City of Sammamish*, 127 Wn. App. 574, 113 P.3d 494 (2005), and its restrictive view of examiner powers. Yet the issue under review in *Exendine* was

exceedingly narrow, whether an examiner had authority to rule on a challenge to the validity of a district court search warrant that was valid on its face but allegedly exceeded the district court's jurisdiction to issue it. The examiner there sensibly concluded that she had no authority to address a challenge to a court's jurisdiction. Examiners know where we sit in the pecking order—courts get to overturn us, but we do not get to overturn courts.

7. In its single paragraph on examiner authority, *Exendine* included unfortunate and broad *dicta* about an examiner having no power to rule, or even to *interpret*, constitutional issues. That fundamentally misunderstands the role an examiner must play and lacks any thoughtful nuance. For example, "reasonable use" is "a legal concept articulated by federal and state courts in regulatory taking cases." KCC 21A.06.950. How, under *Exendine*'s flowery language, could an examiner do her job and rule on an appeal involving a reasonable use exception if she could not interpret federal Fifth Amendment and state Article I, Section 16 caselaw?

8. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 639, 689 P.2d 1084 (1984) is in some sense even worse, and certainly more patronizing, in that it opined that an examiner "would lack the legal expertise to handle… questions" like equitable estoppel.[1]

9. Instead, a far more through, nuanced, and persuasive approach to determining examiner authority comes from *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 110 P.3d 812 (2005) and *Irondale Cmty. Action Neighbors v. W. Wash. Growth Mgmt. Hearings Bd.*, 163 Wn. App. 513, 262 P.3d 81 (Wn. App. 2011). *Motley-Motley* explained that, in addition to *express* authorization, a tribunal has *implied* authority to do everything lawful and necessary to carry out its statutory delegation to expeditiously and efficiently hear cases. 127 Wn. App. at 74. *Irondale* applied *Motley-Motley* and held that, to carry out its statutorily-delegated authority, it was necessary for the tribunal to apply *res judicata* and collateral estoppel, and therefore the tribunal had implied statutory authority to do so, despite those being equitable doctrines. 163 Wn. App. at 523.

10. Thus, we have implied authority to consider and rule on equitable, constitutional or other matters if necessary for us to effectively hear cases. So, for example,

    - We bar parties from attempting to relitigate issues that either have been litigated, or that could have been litigated, at an earlier stage, despite that bar being essentially equitable.

[1] We do not know what the quality of the examiner community was like in 1984, as that was a decade before we started law school. But after law school we clerked for a U.S. District Court judge, then clerked for a Ninth Circuit judge, served as a trial attorney with the U.S. Department of Justice, and have had numerous full-length law review articles published. And yet when we attend examiner conferences we are nowhere close to the smartest lawyer in the room.

- When we interpret an ordinance susceptible to two plausible interpretations, one of which raises serious constitutional questions, we follow the doctrine of constitutional avoidance and choose the interpretation that is constitutionally-consistent.

- When we decide objections to certain evidence, we apply the exclusionary rule set forth in the federal and State constitutions and, if we conclude the evidence was obtained by an unlawful search conducted by a governmental actor (or by a private person acting essentially as the government's agent), we exclude that evidence and (under the fruit of the poisonous tree doctrine) all evidence derived from that.

- We constantly keep in mind constitutional due process considerations like the requirement for sufficient notice and an opportunity heard, along with the nature of the private interest impacted being a factor in determining how much process is due in a given case.

Examiner Authority—over Preemption Claims in General and Here

11. Our implicit authorization to do what is lawful and necessary to carry out our charge to expeditiously and efficiently hear cases does not automatically end because an issue involves preemption, despite preemption being a constitutional claim. For example:

    - Within the State's shoreline jurisdiction, RCW 90.58.065 curbs local government's authority to limit certain agricultural activities. Thus, where we consider the evidence and find that the complained-of activity was "agricultural" and occurred within the shoreline jurisdiction, and we conclude that application of the County's critical areas code (KCC chapter 21A.24) to that particular activity is preempted by RCW 90.58.065, we do not apply the more restrictive county code, despite preemption being a constitutional claim.

    - A "use" (defined as the purpose for which a structure is built) is "established" when it "has been in continuous operation for more than sixty days." KCC 21.06.1345, .1347. So, a structure in place for more than sixty days is essentially "permanent" under the code and requires a building permit, unless excepted by some other portion of the code. However, RCW 19.27.065 declares temporary growing structures used solely for the commercial production of horticultural plants as "not considered a building." Thus, where we view the evidence and find a structure that has remaining standing for more than 60 days is a "temporary growing structure," we exempt it from county building permit requirement despite the basis for our decision essentially resting on constitutional grounds.

12. Appellants' preemption claim is nowhere near the agricultural activity/temporary growing structure examples. Nor it is even an as-applied challenge that some particular way Local Services was interpreting KCC chapter 6.74 as it related to Cougar or Cave B

ran afoul of the Statute. Instead, it is a full-frontal attack on the County's ability to enact an ordinance requiring adult beverage business licenses in the face of ostensible state preemption.

13. In keeping with *Irondale* and *Motley-Motley*, our rules do not prohibit us from considering or deciding constitutional issues. *See, e.g.,* HEX XII.B.1 (examiner excludes "unconstitutionally obtained evidence"). However, our rules are clear that "defenses or claims based on the constitutionality of County regulations may be raised to exhaust administrative remedies and make a record for judicial review, but they are beyond the examiner's jurisdiction to decide." HEX III.A.1. That is precisely what Appellants' preemption defense is here.

14. Even if we had no explicit rule, it is not necessary to rule on this particular preemption claim in order to carry out our statutorily-delegated authority. In the shorelines-greenhouse examples above, we would need to first review exhibits and take testimony and argument to determine whether the activity actually qualifies as "agricultural," whether activities were, in whole or part, within the State's shoreline jurisdiction, and whether a particular structure actually qualifies as a "temporary growing structure." And often such issues arise where that activity or structure is part of a larger dispute involving numerous other uses and structures on a given property. So rather than essentially having to say something like,

> As to the fourth alleged violation, after considering all the evidence I find the structure pictured in exhibits 27 and 28 is a 'temporary growing structure,' which in this state is 'not considered a building' and thus does not need a permit. However, because that would essentially require me to consider a constitutional claim that state law preempts a county ordinance, I will uphold the violation and include in my decision a deadline for you to apply for a building permit or face monetary penalties or abatement. However, you can take the elevator down a few floors in this courthouse and appeal me to superior court. And after an untold waste of everyone's time and money, the court will eventually hand me my head,

we would instead follow *Motley-Motley* and *Irondale* and apply the state law that overrides a county law. Here, in sharp contrast, Appellants (or any other alcohol-related business) could have challenged KCC chapter 6.74 as soon as it was enacted, or could have done so at any point Local Services was requiring them to apply for such a license. And there is no factual record we could develop here that would assist a court's eventual review.

15. Finally, just as the examiner in *Exendine* had no implied power to decide whether the district court exceeded its authority in issuing a search warrant that was valid on its face, we have no implied power to decide whether the County Council (the entity that

appoints examiners, KCC 20.22.020.B) exceeded its authority in requiring adult beverage business licenses. Just as courts may find that examiners erred but examiners do not have a reciprocal power, councils may find that examiners erred (KCC 20.22.240.D) but examiners do not have a reciprocal power.

16. We do not have jurisdiction to rule on Appellants' particular preemption challenge.

Preliminary Analysis of Preemption Claim

Introduction

17. Normally, when we deny a motion or objection, we require the parties to play through to the end of the examiner process and a final examiner decision, and only at that point are they allowed to seek judicial review. However, in certain select cases where we have ruled against a party but found that they raised a serious, fundamental, threshold question that further factual development was unlikely to illuminate, we have allowed that party to seek interlocutory judicial relief. There is nothing specific about Cave B's or Cougar's situation that would shed light on whether the County is preempted from requiring an adult beverage business license. We thus explore the preemption claim enough to determine whether it has sufficient legs to warrant pausing examiner proceedings, if Appellants wish to take this threshold issue to superior court now.

Key Standards

18. There is a strong presumption against finding preemption, and courts make every effort to reconcile state and local law. *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Lands Servs.,* 148 Wn.2d 451, 477, 61 P.3d 1141 (2003). The county police power is broad, with a county presumed to have had the regulatory authority to adopt the ordinance, the ordinance being valid unless preempted, and a challenger having to show it is unconstitutional beyond a reasonable doubt. *Emerald Enters., LLC v. Clark Cty.*, 2 Wn. App. 2d 794, 803-04, 413 P.3d 92 (2018).

19. Here, the Statute reads as follows.

> No municipality or county shall have power to license the sale of, or impose an excise tax upon, liquor as defined in this title, or to license the sale or distribution thereof in any manner; and any power now conferred by law on any municipality or county to license premises which may be licensed under this section, or to impose an excise tax upon liquor, or to license the sale and distribution thereof, as defined in this title, shall be suspended and shall be of no further effect: PROVIDED, That municipalities and counties shall have power to adopt police ordinances and regulations not in conflict with this title or with the regulations made by the board.

20. Breaking it down, RCW 66.08.120 contains four overlapping but separately provisions. A local government may not (a) license the sale of, or impose an excise tax upon, liquor or (b) license the sale or distribution of liquor in any manner. And the Statute nullifies (c) any pre-existing local power "to license premises" or to tax or license alcohol sales or distribution, but softens those prohibitions somewhat by (d) allowing localities to exercise their police power in ways not conflicting with the title or with regulations of what is now the Washington State Liquor and Cannabis Board. (Note for brevity sake and to avoid confusion, we will refer to them as the Liquor Board, and to the Growth Management Hearings Board as the Growth Board.)

Taxes and Fees Are Red Herrings

21. Intervenors and the County focus on the first provision, the "license the sale of, or impose an excise tax upon, liquor." Int. opp. at 7 (bolding and underscoring "license the **sale of**, or **impose an excise tax upon**, liquor" while not emphasizing the Statute's additional terms); Cty. opp. at 8-11. The fault, however, lies with Appellants, who started us down that dead-end road by claiming that the County charging a licensing *fee* was preempted, citing a 1934 Court case we explore below. App. mot. at 10-11. Appellants' assertion is easily dismissed.

22. We take judicial notice that a $100 licensing fee in 2022 equates to a fee of less than $5 in 1934 terms.[2] It would not even cover the cost of Local Services setting up a file, let alone starting review. Thus, taxes are *not* the issue, and referencing the $100 fee only distracts from the argument for preemption that would exist even if there was no fee to apply for an adult beverage business license, just a requirement to obtain one. The question of whether the bar against a locality licensing alcohol sale or distribution, and/or revocation of local power to "license premises" preempts a KCC chapter 6.74 license, or whether the license requirement is a non-conflicting police ordinance, would still exist even if the County never saw a dollar.

23. Much of the caselaw cited in the briefs does not really address the heart of the matter. For example,

- *Emerald Enterprises, LLC v. Clark County*, 2 Wn. App. 2d 794, 413 P.3d 92 (2018), does not add much (beyond confirming that a preemption claim is a constitutional claim, discussed above). The issue under consideration in *Emerald* was a zoning restriction. (The local marijuana ordinance in question came from Clark's development code. CCC chapter 42.) The court did not tackle licensing, as Clark had outright banned the retail sale of recreational marijuana, leaving nothing to license;

[2] https://www.in2013dollars.com/us/inflation/1934?amount=500#:~:text=Value%20of%20%24500%20from%201934,cumulative%20price%20increase%20of%202%2C111.01%25.

- *Corral, Inc. v. Wash. State Liquor Control Bd.*, 17 Wn. App. 753, 566 P.2d 214 (1977), is unavailing, as *Corral* dealt with the *reverse* claim—that the State was regulating conduct delegated to local authorities, not that a local jurisdiction had run afoul of the Statute. The panel's summation of the Statute adds little value.

- *Ropo, Inc. v. Seattle*, 67 Wn.2d 574, 409 P.2d 148 (1965), is also not on point. The issue under review in *Ropo* was whether an admissions tax on a venue that served liquor amounted to an excise tax on liquor, given that the state had, post-1934, authorized localities to levy admission taxes. The panel did *not* consider a licensing requirement related to the sale or distribution of liquor or involve a local jurisdiction licensing alcohol-serving premises.[3]

Analysis of Licensing Alcohol-Related Sales, Distribution, or Premises

24. A few of the authorities the parties cite address the specific issue of whether a locality can require an alcohol-related license.

25. *Century Brewing Co. v. City of Seattle*, 32 P.2d 1009, 177 Wn. 579 (1934), is sort of on point, but not as much as it should have been. The first analysis the Court undertook involved the City's ability to regulate alcohol distributors, given that a different City charter provision had been repealed; nowhere in those many pages of discussion did the Court mention the Statute. 177 Wn. at 580-87. Because the Court grounded that discussion on the niceties and timing of various Seattle enactments, it likely follows that the Court at least unconsciously presumed Seattle's authority to license distributors was not impacted by the Statute. But the Court did not quote or even reference the Statute or address the Statute's ban on local governments "licens[ing] the sale or distribution thereof in any manner" and withdrawal of local government's authority "to license premises which may be licensed under this section" in that portion of its analysis.

26. The Court did go on to briefly analyze the second question, related to the two-dollar-per-barrel fee and related fees. In *that* discussion the Court quoted the Statute in striking down Seattle's fees as a revenue-generating excise tax. 177 Wn. at 587-588. But the Ordinance here is in no sense a tax, and so *Century's* Statute-specific discussion is of maddeningly little assistance to our question.

[3] Intervenor's spin that *Ropo* stands for the proposition that RCW 66.08.120 pre-emption "does not come into play unless the ordinance in question may be said to impose an 'excise tax upon liquor'" (Int. opp. at 7) is specious, because the panel was only discussing whether an admissions tax was a liquor excise tax, and not anything about licensing a business or premises. Appellants' speciousness equivalent was citing a Local Services staff report that raised the potential preemption issue, with Appellants claiming staff had "conceded [that] the Statute preempts [Local Services'] authority to require adult beverage business licenses." App. mot. at 12. The County correctly counters that the staff report's discussion was limited to production limits and on-site tasting and sales, and said zero about Local Services' ability to require a business license. Cty. opp. at 8.

27. More specific is a 1953 Attorney General (no. 55). Though issued in the context of a question about a business tax, its language about localities licensing alcohol-related establishments is the most specific of any authority cited. The Attorney General:

- started his analysis by describing the Statute as follows: "in RCW 66.08.120, the state preempted the field with respect to the licensing of "'any premises which may be licensed under this section"' (which he thought likely meant the entire act); the wineries, breweries, distilleries, cideries, and remote tasting rooms KCC chapter 6.74 requires licenses for seem to be "premises";

- went on to explain that "[t]he object of a 'license' is to confer a right or power which does not exist without it and the exercise of which, without the license, would be illegal"; KCC 6.74.030 prohibits anyone from operating or maintaining an adult beverage business in unincorporated King County without a KCC chapter 6.74 license; and

- concluded that a tax "contemplates the issuance of a license, or permit, without which the conduct of the business would be illegal. The issuance of such license or permit by a city is an exercise of the very power which RCW 66.08.120 takes away"; again, KCC 6.74.030 requires a license, without which the conduct of the winery, brewery, distillery, cidery, or remote tasting room would be illegal.

That is strong, unequivocal language, and it directly addresses the Statute's "licens[ing] the sale or distribution thereof in any manner" and withdrawal of local government's authority "to license premises which may be licensed under this section" language.

28. The Statute's withdrawal of local governments' authority to "license premises" sounds like an oblique reference to a 19th Century-era provision that:

> The legislative authorities of each county, in their respective counties, shall have the power to grant license to persons to keep drinking houses or saloons therein, at which spirituous, malt, or fermented liquors and wines may be sold in less quantities than one gallon; and such license shall be called a retail license upon the payment, by the person applying for such license, of the sum of three hundred dollars a year into the county treasury, and the execution of a good and sufficient bond, executed to such county in the sum of one thousand dollars, to be approved by such legislative authority or the county auditor of the county in which such license is granted, conditioned that he or she will keep such drinking saloon or house in a quiet, peaceable, and orderly manner: PROVIDED, The foregoing shall not be so construed as to prevent the legislative authority of any county from granting licenses to drinking saloons or

> houses therein, when there is but little business doing, for less than three hundred dollars, but in no case for less than one hundred dollars per annum: AND PROVIDED FURTHER, That such license shall be used only in the precinct to which it shall be granted; PROVIDED FURTHER, That no license shall be used in more than one place at the same time. AND FURTHER PROVIDED, That no license shall be granted to any person to retail spirituous liquors until he or she shall furnish to the legislative authority satisfactory proof that he or she is a person of good moral character.

RCW 67.14.040 (underscore added). It certainly *sounds* like the "any power now conferred by law on any municipality or county to license [alcohol-related] premises…or to license the sale and distribution thereof" that the Statute "suspended" and made "of no further effect" in 1933.

29. A 1981 Attorney General letter opinion saw an explicit connection between RCW 67.14.040 and the Statute, in answering a question of whether a county could "lawfully grant a 'retail license' to establishments selling liquor pursuant to RCW 67.14.040 in light of apparently contrary provisions in [the Statute]?" A Deputy Attorney General said no, determining that RCW 67.14.040 "must be deemed to have been impliedly repealed" by the Statute's "'any power now conferred by law on any municipality or county to license premises which may be licensed under this section, or to impose an excise tax upon liquor, or to license the sale and distribution thereof, as defined in this title, shall be suspended and shall be of no further effect'" language. Letter opinions do not carry the same weight as Attorney General opinions, but along with the 1953 Attorney General letter, it is the rare source specifically analyzing the licensing-premises portion (as opposed to the taxing portion) of the Statute.

30. The legislature, as part of larger cleanup bills, cosmetically amended RCW 67.14.040 to replace "county commissioners" with "legislative authority" in 1973 and—even post 1981 letter opinion—again in 2012 to add "or she" to "he." That is perhaps an indication that the Legislature did not consider it dead letter. But the RCW Reviser's note for chapter 67.14 states that the act was "'in relation to licenses'" and empowered counties to license persons dealing in intoxicating liquors, and the Reviser found that for "sections relating to intoxicating liquors, it seems clear that this field has been preempted by the state; see RCW 66.08.120 [the Statute]."

31. RCW 67.14.040 may not be applicable, because the Statute references localities licensing "premises which may be licensed under this section." Given the Attorney General's 1953 reasoning, RCW 66.08.120 reference to "this section" may mean the entire act, but RCW 67.14.040 was *not* part of the 1933 Washington State Liquor Act, nor is it housed alongside the Statute in RCW chapter 66. And the Liquor Board accepts that local

governments will issue alcohol-related licenses, even partnering with various cities to process business licenses and linking to other local jurisdictions' licensing requirements. Int. opp. at 17-19. So, someone else at the State has sent a strong signal in the opposite direction, and KCC chapter 6.74 passes the Statute's requirement to not "conflict with regulations made by the [Liquor Board]." But Appellants' case seems stronger because of RCW 67.14.040 than it would without it.

Police Power

32. Next, we consider the Statute's carve out that "municipalities and counties shall have power to adopt police ordinances and regulations not in conflict with this title or with the regulations made by the [Liquor Board]."

33. Appellants explicitly concede that the County has authority to regulate the land use aspects of their properties, agree with the County that the Statute does not prohibit a local jurisdiction's authority to regulate zoning for adult beverage business, and stipulate Statute does not preempt the Ordinance's zoning code changes. App. reply at 2, 6.

34. Moreover, the criteria KCC 6.74.080 sets are very land use-specific. The bulk of the Ordinance made zoning- and development-related changes like determining minimum lot sizes, limiting sites to certain zones, tackling legal nonconformance, provisions related to access, setbacks and landscaping, minimizing impacts, limiting noise, setting hours of operation, and (via what was codified as KCC chapter 6.74) ensuring annual review. It seems akin to mineral extraction review under KCC chapter 21A.22—determining minimum lot sizes, limiting sites to certain zones, tackling legal nonconformance, provisions related to access, setbacks and landscaping, minimizing impacts, limiting noise, setting hours of operation, and ensuring annual review. And Local Services' bases for denying Cave B's and Cougar's licenses here rested entirely on zoning and development standards, with nothing specifically alcohol-related.

35. However, the approval process being challenged as ostensibly preempted does not lie in the building code, or planning code, or zoning code, or health code. While the underlying objective is to promote and protect the health, safety and general welfare, KCC chapter 6.74 sits within the business licensing Title 6, and its purpose is to establish *business licensing standards* for adult beverage businesses. KCC 6.74.010. Again, the Statute does not take away local police power to regulate but instead a localities ability to "*license* the sale or distribution [of alcohol] in any manner" and the Statute suspends any power previously conferred to "*license* premises" which are licensed under the Washington State Liquor Act (emphasis added).

36. We have no doubt that the County could have created a development permit within the zoning code, or indeed almost anywhere other than the licensing code, and in there set decision criteria perhaps identical to KCC chapter 6.74, without raising a preemption issue.[4] And there is a strong presumption against finding preemption for the County having the regulatory authority to adopt the Ordinance; the Ordinance is valid unless preempted by the Statute, and a challenger must show unconstitutionality beyond a reasonable doubt. But ultimately we are discussing a local license for an alcohol-related sales, distribution and premises, which sounds like the local power the State explicitly withdrew via RCW 66.08.120.

Next Steps

37. It may turn out that there is only smoke here and no fire. Perhaps we are lost in the trees and a superior court will more clearly see the whole forest, waive off the seeming conflict with the Statute's language on alcohol-related sales, distribution, and premises, determine the licensing requirements of KCC chapter 6.74 are a police power ordinance not in conflict with the state act (especially since the Ordinance is not in conflict with the Liquor Board's regulations) and dismiss Appellants' preemption challenge in short order. But we see enough meat here that if Appellants want to take the preemption issue to superior court now, we will pause our proceedings to allow them to do it. That is especially appropriate because we have multiple appeals, currently stayed, raising a preemption defense; so, without a definitive ruling on preemption, this will likely not be our last preemption rodeo.

38. The other threshold issue Appellants mentioned in footnote 2 of their motion is their assertion that Local Services had no authority to enforce any provision of the Ordinance after the Growth Board's finding of invalidity.[5] The *impact* of the Growth Board striking down numerous zoning code revisions may change the *substantive* standard of what an applicant must show to meet KCC 6.74.080's requirements—a legal nonconforming use, a vested legal nonconforming use, substantial steps to document compliance with KCC Title 21A, or conformance with portions of the Ordinance the Growth Board invalidated. However, no tribunal has struck down the portion of the Ordinance that became KCC chapter 6.74, including the provision that one may not operate an adult beverage business without a business license. If Appellants are seeking a ruling essentially enjoining Local Services from requiring or deciding business license applications until the dust settles on KCC chapter 21A, and if Appellants elect to pursue the preemption issue

[4] KCC 21A.55.110.D sets up a permit process for remote tasting rooms, but such an application is explicitly in *addition* to the business license requirement.

[5] As we noted at conference, Cougar's amended appeal statement accidentally left off one issue (no. 9) mentioned as in Cave B's amended appeal, and the issue would be included in Cougar's appeal.

now anyway, it would be far more efficient to loop that threshold issue into their court filing. (We will consider this issue duly raised for exhaustion purposes.)

39. We recognize that there is a short turnaround between this order and Tuesday's conference, but we expect Appellants to do their utmost to be ready to announce at the outset whether or not they intend to pursue interlocutory review or instead whether we should schedule further examiner proceedings.

Conclusion

40. Lacking authority to decide Appellants' preemption motion, we DENY it on jurisdictional grounds.

DATED September 16, 2022.

David Spohr
Hearing Examiner

September 16, 2022

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CERTIFICATE OF SERVICE

SUBJECT: **COUGAR CREST ESTATE WINERY (BUSL200009), AND CAVE B. LLC DBA CAVE B ESTATES WINERY (BUSL200029)**
Business License Appeal

I, Lauren Olson, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **ORDER ON PREEMPTION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED September 16, 2022.

Lauren Olson

Lauren Olson
Legislative Secretary

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